A

SRI PALMAR DEVELOPMENT & CONSTRUCTION SDN BHD

v.

JURUKUR PERUNDING SERVICES SDN BHD

B

HIGH COURT MALAYA, KUALA LUMPUR
LEE SWEE SENG JC
[SUIT NO: S-22-1536-2002]
13 JULY 2010

C

PROFESSIONS: *Land Surveyors - Payment of fees - Whether payment might be less than scale fees as prescribed in Thirteenth Schedule to Licensed Land Surveyors Regulations 1959 - Whether land surveyor and client could agree on a sum less than the prescribed scale and pay same to Land Surveyors Board for work to commence*

D

WORDS & PHRASES: *'Shall' - Licensed Land Surveyors Regulations 1959, reg. 99(1) and (2) - Usage of - Whether mandatory*

The plaintiff was a housing developer and had appointed the defendant, a firm of licensed land surveyors to do the title survey for the said land
E leading to the issuance of the sub-divided titles for a fee orally agreed to be RM100,000 which sum was subsequently raised to RM130,000. The defendant claimed that there was no such agreement and that the full fees of RM219,245 calculated as per the Thirteenth Schedule of the Licensed Land Surveyors Regulations 1959 ('Regulations') was to be
F paid to the Land Surveyors Board ('Board') as provided for under reg. 99(1) and (2) of the Regulations before the start of the title survey work. [Editor's note: The Licensed Land Surveyors Regulations 1959 have since been revoked by the Licensed Land Surveyors Regulations 2011]. The plaintiff sued for damages for repudiatory breach of the
G contract engaging the defendant for the title survey work. The plaintiff obtained a mandatory injunction compelling the defendant to issue a release letter upon depositing the sum of RM83,658.37 into court. Without the release letter, the plaintiff could not engage a new licensed land surveyor to take over the work of title survey and issuance of the
H individual titles to the land. The defendant now sought for the court's determination in this O. 14A Rules of the High Court 1980 application on the following issues: (1) whether an agreement on discounted fees for title survey work at RM130,000 or at RM100,000 was in conflict with the Licensed Land Surveyors Act 1958 ('the Act') and Regulations, and (2) whether the agreement on a discounted fee was not valid in law.

I

Held (dismissing defendant's application with costs):

(1) Notwithstanding the usage of the word "shall" in reg. 99(1) and (2) of the Regulations, the word "shall" was ordinarily mandatory but sometimes not interpreted as such if the context or the intention otherwise so demanded. The scale fees was what it was, ie, prescribed and proscribed fees beyond which was prohibited and punishable with a penalty and below which was permissible though not preferred. The scale fees was recommended fees and regulated to prevent overcharging. If there was justification for going below the scale due to bulk work, the client being a non-profit body, the impecuniousness of the client or for some other reasons, then it ought to be valid and permissible. There could not be anything wrong with a discount unless the legislation expressly prohibited it. If the professional body had wanted a "no-discount" to be applicable, then it should be stated in clear, unequivocal and unambiguous language as in, for eg, r. 6 of the Solicitors' Remuneration Order 2005. Professions like the architects employed the use of a minimum fee structure. If the Board had wanted the "minimum charge" to be applicable throughout all jobs undertaken, they could have employed the scale of minimum fees specified as the architects had done. (paras 11 & 14-19)

(2) The use of the word "must" was another way of expressing that complying with the scale of fees was mandatory. That left no room for the exercise of any residual discretion. If mandatory could be measured, then on an increasing scale, one would start with "may" where there was a minimum, progressing to "shall" where there was much of it and peaking at "must" where there was a maximum of it. Conversely, if discretion could be distilled, then on a decreasing scale, one would start with much discretion in "may" declining to a minimum in "shall" and dropping to "must". (paras 22 & 24-25)

(3) A paradigm shift taking place would soon set aside inflexible fixed scale fees system and structure in favour of fair competition where customers, consumers, and clients would have a choice with fees as a factor to be taken into consideration before engaging the services of a professional. Notably, many jurisdictions had done away with inflexible fixed scale fees for non-contentious legal work. Further, if charging a fee lower than the stipulated scale was to be prohibited, penalised and punished, then the Licensed Land Surveyors Act 1958 (the 'Act') must criminalise the act and any

action or device aimed at achieving or arriving at what was actually a discount. At the very least the Act should state in plain language that any agreement on a discounted fee was null and void and unenforceable and that the member who had indulged in such a practice should be deemed to be in misconduct. The Regulations punish against overcharging but not undercharging or non-charging. (paras 34-35)

(4) There was no legal prohibition against agreeing to a fee lower than the prescribed scale. An agreement on discounted fees was not in conflict with the structure and scheme of scale fees under the Act and Regulations. (para 36)

[Editor's note: The Licensed Land Surveyors Regulations 1959 have since been revoked by the Licensed Land Surveyors Regulations 2011].

Case(s) referred to:

Central Inland Water Transport Corp Ltd v. Brojo Nath Ganguly AIR 1986 SC 1571 ***(refd)***

Enderby Town Football Club Ltd v. Football Association Ltd [1971] Ch 591 ***(refd)***

In the matter of Phool Din & Ors AIR 1952 Allahabad 491 ***(foll)***

Koid Hong Keat v. Rhina Bhar [1989] 2 CLJ 1219; [1989] 2 CLJ (Rep) 5 HC ***(refd)***

M Pentiah v. Muddala Veeramallappa AIR 1961 SC 1107 ***(refd)***

Mott Macdonald (Malaysia) Sdn Bhd v. Hock Der Realty Sdn Bhd [1997] 1 CLJ Supp 182 HC ***(refd)***

Re A Solicitor [1945] 1 All ER 445 ***(refd)***

Richardson v. Mellisa [1824] 2 Bing 229 ***(refd)***

Sainik Motors v. State of Rajasthan AIR 1961 SC 1480 ***(refd)***

State of UP v. Babu Ram AIR 1961 SC 75 ***(refd)***

Vita Food Products, Inc v. Unus Shipping Co Ltd (In Liquidation) [1939] AC 277 ***(refd)***

Legislation referred to:

Architects (Scale of Minimum Fees) Rules 2010, r. 3

Contracts Act 1950, ss. 24(a), (b), (e), 25

Licensed Land Surveyors Regulations 1959, regs. 8(1), (2), 99(1), (2), 100(3), 101(d)

Rules of the High Court 1980, O. 2 r. 2(1), (2), O. 14A

Solicitors' Remuneration Order 2005, r. 6

Contracts Act [India], s. 23

For the applicant/defendant - Tee Han Cheong; M/s Tee & Partners

For the respondent/plaintiff - Lim Chong Fong; M/s Azman Davidson & Co

Reported by Usha Thiagarajah

JUDGMENT

Lee Swee Seng JC:

Prologue

[1] Many professionals, towards the end of each month, have to make that gentle call to their clients to chase for payment of fees to meet their commitment to staff, landlord and bankers and for cash flow. Some outsource it to others to do so while others have a special department in the firm to do just that. Not so our land surveyor friends; they are a more fortunate lot for their fees are paid to the Land Surveyors Board ("the Board") in accordance to the prescribed scale even before they need to commence work.

[2] The question that arises for consideration in this O. 14A Rules of the High Court ("RHC") application by the defendant is whether the payment of fees to the Board may be less than the prescribed scale. In other words can both the land surveyor and the client agree on a sum less than the scale prescribed and pay the same to the Board for work to commence. To put it simply, is the scale of fees prescribed a mandatory scale for all to follow or is it permissible to go below the scale in a case where both the client and the professional land surveyor agree to a lower fee or a discount, a word frowned upon by professionals as some may feel insulted if their clients were to ever ask for a discount.

Parties

[3] The plaintiff is a housing developer of a 60-acre land in Tanjung Sepat, Mukim Batu, Daerah Kuala Langat, Selangor. The plaintiff alleged that they had appointed the defendant, a firm of Licensed Land Surveyors to do the title survey for the said land leading to the issuance of the sub-divided titles for a fee orally agreed to be RM100,000 which sum was subsequently raised to RM130,000. The defendant stated that there was no such agreement and that the full fees of RM219,245 calculated as per the Thirteenth Schedule of the Licensed Land Surveyors Regulations 1959 ("the Regulations") is to be paid to the Board as provided for under reg. 99(1), (2) before commencement of the title survey work.

Problem

[4] Both parties stood their stand and stance in a strategy that resulted in a stalemate. The plaintiff sued for damages for repudiatory breach of the contract engaging the defendant for the title survey work. On 19 September 2003, the plaintiff obtained a mandatory injunction

compelling the defendant to issue a letter of release letter to them upon depositing within a week the sum of RM83,658.37 into court. Without the release letter the plaintiff could not proceed to engage a new licensed land surveyor to take over the work of title survey and issuance of the individual titles to the land.

[5] Thereafter the matter went into a lull and it was only on 4 December 2009 that the defendant filed an application under O. 14A RHC for a speedy determination of a few questions of law which may effectively dispose off the matter.

Prayers

[6] In this O. 14A RHC application, the defendant had sought the court's determination on the following questions of law:

(a) Whether an agreement on discounted fees for title survey work at RM130,000 or at RM100,000 is in conflict with the Licensed Land Surveyors Act 1958 ("the Act") and regs. 99(1) & 99(2) of the Regulations?

(b) In the event that the answer to (a) above is in the positive, whether the agreement on a discounted fee is not valid in law and null and *void ab initio* under s. 24(a) and 24(b) and s. 25 Contracts Act 1950?

(c) In the event that the answers to (a) and (b) above are in the positive, then this action be struck off with cost to be taxed and paid by the plaintiff to the defendant.

Principles

[7] The defendant submitted that there are clear and unambiguous wordings in the Act and the Regulations that prohibit giving of discount on fees chargeable on title surveys and these can be found in:

(i) Regulation 99(1) of the Regulations: the regulation is couched in mandatory language "Every land surveyor making a title survey **shall charge fees as prescribed** in the Thirteenth Schedule hereto" (emphasis added);

(ii) Regulation 99(2) of the Regulations: this regulation is also couched in mandatory language and making it compulsory that the client shall deposit the fee with the Board and no one else, "The fee shall be deposited with the Board by the client before the title survey is carried out.";

(iii) Regulation 100 of the Regulations: this regulation spells out the penalty to be imposed on land surveyor if the title survey is not completed within six months after the scale fee has been deposited with the Board. The penalty is serious: suspension of the land surveyor from practice for a period of three months. In such an event, the Board may appoint another land surveyor to complete the title survey but still making it mandatory that the fees shall be charged as per the Thirteen Schedule of the Act and the Regulation.

Regulation 100(3) provides "The Board may, in any case referred to in sub-regulation (2), order the title survey to be carried out and completed by the Survey Department or another licensed land surveyor and the fee shall be paid in accordance with the provisions of reg. 99.

(iv) Regulation 101(d) of the Regulations further states "Every licensed land surveyor shall observe and be guided by the following provisions of the Code of Professional Conduct: every licensed land surveyor other than employees of statutory bodies shall, for making a title survey, be remunerated by the fees payable by his client to the Board under reg. 99(1)."

[8] It was further submitted by the defendant that by making it compulsory and mandatory for the client of a land surveyor to pay the exact amount of the scale fees charged in accordance with the Thirteen Schedule of the Regulations to the Board, it is the intention of the Act and the Regulations that there shall be no discount on the fees charged on title survey.

[9] The defendant further urged the court that from the clear wordings of the Act and the Regulations, it can be construed that the objective of the said laws is aimed at protecting the interests of the members of the public (for instance, the purchasers of properties in a housing development) in ensuring that they get their final titles (as compared to qualified titles) timeously after the completion of the building. With the issuance of final titles, it will in turn, maintain and enhance the integrity of the Torrens Land System in Malaysia. By allowing the land surveyor and/or his client the latitude and liberty to agree on the title survey fees chargeable, whether express or implied, will defeat the said aim of the Act and the Regulations and is plainly against the public policy as well.

[10] What does the word 'shall' mean? Is it more akin to and indeed amounting to a 'must' or can it be a mere 'may'? Must the word 'shall' mean a mandatory 'must' or may it mean a directory 'may'? I am reminded of the verbal exchange in Lewis Caroll's 'Through the

Looking Glass'. 'When I use a word,' Humpty Dumpty said, in a rather scornful tone, 'it means just what I choose it to mean, neither more nor less.' 'The question is,' said Alice, 'whether you can make words mean so many different things.' 'The question is,' said Humpty Dumpty, 'which is to be master-that's all.'

[11] I agree that generally the word 'shall' is ordinarily mandatory but it is sometimes not so interpreted if the context or the intention otherwise demands, as per Hidayatullah J in *Sainik Motors v. State of Rajasthan* AIR 1961 SC 1480. Similarly, in *State of UP v. Babu Ram* AIR 1961 SC 75, Subbarao J stated:

> When a statute uses 'shall' *prima facie* it is mandatory, but the court may ascertain the real intention of the Legislature by carefully attending to the whole scope of the statute.

[12] In the Privy Council case from Nova Scotia in *Vita Food Products, Inc. v. Unus Shipping Co Ltd (In Liquidation)* [1939] AC 277, Lord Wright stated at p. 293:

> Illegality is a concept of so many varying and diverse applications, that in each case it is necessary to scrutinize the particular circumstances with precision in order to determine if there is illegality and if so what is its effect. As Lord Campbell said in reference to statutory prohibition in *Liverpool Borough Bank v. Turner* 2 De G.F. & J. 502, 507:
>
> No universal rule can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed.
>
> … Each case has to be considered on its merits. Nor must it be forgotten that the rule by which contracts not expressly forbidden by statute or declared to be void are in proper cases nullified for disobedience to a statute is a rule of public policy only, and public policy understood in a wider sense may at times be better served by refusing to nullify a bargain save on serious and sufficient grounds.

[13] Closer to home my attention was drawn by the plaintiff's counsel to our very own case of *Mott Macdonald (Malaysia) Sdn Bhd v. Hock Der Realty Sdn Bhd* [1997] 1 CLJ Supp 182, where at p. 195 Abdul Malik Ishak J (as he then was) opined that:

> The consulting engineers in performing any of the professional services described in para. 1 of Part A shall be paid in accordance with only one of the following scale of fees as described in para. 1(1), 1(2) and 1(3) of this Part, and at p. 197:

> Be that as it may, it is my judgment that the plaintiff did not charge the defendant exorbitantly in blatant disregard to the scale of fees set by the Board of Engineers. In actual fact the plaintiff's fees were reasonable and on the lower scale. It seems to me that the object of the scale of fees set by the Board of Engineers is to put in check recalcitrant engineers who wittingly or unwittingly impose exorbitant fees.

[14] The scale of fees is what it is, a prescribed and proscribed fees, beyond which it is prohibited and punishable with a penalty and below which it is permissible though not preferred.

[15] The scale of fees is recommended fees and regulated in the sense of preventing overcharging. If there is justification for going below the scale because of bulk work or because of the client being a non-profit body or because of impecuniosity of client or for some other reasons, I cannot see why that cannot be valid and permissible. Basically there cannot be something inherently or intrinsically wrong with a discount unless the legislation expressly prohibits it.

[16] If the professional body had wanted a no-discount to be applicable they should have stated in clear, unequivocal and unambiguous language as in for example r. 6 Solicitors' Remuneration Order 2005 which reads:

> There **shall be no discount** on fees specified in this Order. (emphasis added)

[17] There is no such prohibition in the Regulations here.

[18] Some other professions like the architects employ the use of a minimum fee structure wherein no member of the profession is allowed to go below the minimum and indeed it provided that higher fees may be charged under certain circumstances with the prior agreement of the client. Rule 3 of the Architects (Scale of Minimum Fees) Rules 2010 which came into operation on 1 March 2010 provides under 'Payment of fees' the following:

> Any architectural consultancy practice which is engaged by a client to perform any of the architectural consultancy services specified in Part II **shall not charge less than the scale of minimum fees specified** in Part III in addition to the other payments in Part IV, provided that higher fees, where justified by the architectural consultancy practice's special expertise, experience or standing, may be charged with the prior agreement of the client. (emphasis added)

[19] Indeed there are some references to a 'minimum charge' in the Regulations and the Thirteenth Schedule thereto for example in Table I of 'Survey of Land for Building' where at para. 3(b) it is provided that

charge for the preparation of pre-computation plan shall be RM20 per lot, subject to a minimum charge of RM350 per job. These references to a 'minimum charge' are few and far in between and that further underscores the point that if the Board had wanted the 'minimum charge' to be applicable throughout all jobs undertaken, they could have employed the 'scale of minimum fees specified' as the architects have done.

[20] In *M Pentiah v. Muddala Veeramallappa*, AIR 1961 SC 1107 at p. 1113, Subbarao J held:

> Negative words are clearly prohibitory and are ordinarily used as a legislative device to make a statute imperative.

[21] I agree with learned counsel for the plaintiff that reg. 99(1), read together with the Thirteenth Schedule, is not drafted in a similar fashion nor is there any express prohibition against or penalties for charging lesser than scale fees.

[22] There is yet another way of expressing mandatoriness that leaves no room for the exercise of any residual discretion and that is normally achieved by the use of the word 'must'.

We see this employed in the various provisions in the Rules of the High Court 1980. An example is O. 2 r. 2(1), (2) of the RHC where different gradations of a rigorous requirement from a 'directory' may to an 'obligatory' shall to a 'mandatory' must is set out:

> (1) An application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment or order therein **shall** not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.
>
> (2) An application under this rule **may** be made by summons or motion and the grounds of objection **must** be stated in the summons or notice of motion.

[23] Likewise too in reg. 8 on Requirements for entering into articles in the Licensed Land Surveyors Regulations:

> (2) Before entering into articles, a graduate shall produce evidence that he has obtained any first degree in Land Surveying from any universities or institutions, as follows:
>
> (a)
>
> (b)

(c)

(d)

(3) A Malaysian citizen.

(4) Except in the case of the Director General of Survey, a Licensed Land Surveyor must have been registered for more than five years with the Board before he can take in any person under articles.

(5) The Board may, with the approval of the Minister, from time to time amend, vary, add to, revoke, suspend or revise the requirements for entering into articles as prescribed in the provisions of reg. 8 (1) and (2).

[24] If mandatoriness can be measured, then on an increasing scale of it, one would start off with 'may' where there is a minimum of it, progressing to 'shall' where there is much of it and peaking at 'must' where there is a maximum of it.

[25] Conversely, if discretion can be distilled, then on a decreasing scale of it, one would start off with much discretion in 'may' declining to a minimum morsel of it in 'shall' and dropping to 'must' where even a modicum of it is missing altogether.

[26] I must confess that I find it difficult to understand why a system of scale fee is necessary to ensure and enhance the integrity of our Torrens System of title registration. The reverse might well be true: that if developers are allowed to negotiate for a lower fee in the context of bulk work, perhaps with lower fees they can come up with the money to apply for a faster subdivision of titles after the master title has been surveyed. In any event there is no way to prevent the land surveyor from refunding to the client the difference between the scale fees and the negotiated fees after the scale fees have been released to the land surveyor after completion of the title survey work. This rationale of scale fees being there in place to protect the client and the public is a mistaken notion that ought to be debunked. If it is to protect the client then the client should be given the freedom of choice both in the latitude and liberty in being able to negotiate on fees.

[27] It was argued by the defendant that public policy dictates and demands a structured scale fees scheme to ensure quality work is done for a reasonable stipend as stipulated by the Board and that one way to shun shoddy work is to secure that scale fees are paid to the Board before work commences.

[28] Attractive as that argument is, it fails to take into consideration the market forces of competition and the magnanimous fervour of being a professional. Why should any profession immune itself from the market forces of free competition? If there ever was a public policy that justify an inflexibly fixed scale fees on the ground of protecting clients and consumers then even public policy here is fast changing with the passage of the Competition Bill 2010 through two Houses of Parliament where when enforced as law, matters like cartel and professionals ganging-up to gag negotiation on fees with the help of their professional bodies and unfair monopolistic fee structures would be struck down by the Commission, to be set up under the soon to be gazetted Competition Act 2010. Indeed the system and structure of an inflexibly fixed scale fees scheme would have to be set aside as being stifling and suffocating of fair competition. Why should a professional be less professional in his work merely because he has agreed to a lower scale fees? Why should he be penalised and punished and perhaps even paraded as a pariah of his profession just because he has charged a lower fee but no less professional in his work bearing in mind that until he has completed his work within the stipulated time he cannot get his fees from the Board? If a member of the profession wants to charge a lower fee because of his lower cost due to where he is operating from or because he has managed to harness technology to help him in his work, why would any member of his profession wail and wrangle his fist in protestation? Speaking of the legal profession that I am more familiar with, lawyers are known to put in more energy and effort and even exhibit more endurance in cases where they do *pro bono* work especially in the field of public interest litigation. A profession should distinguish itself in the high standard that it sets for its members to achieve and attain and certainly not by a non-negotiable standard and at times perceived to be steep scale fees.

[29] The categories of contracts which are contrary to public policy are not closed. Whilst it has been said that public policy is a very unruly horse, and when once you get astride it you never know where it will carry you (as per Borough J in *Richardson v. Mellisa* [1824] 2 Bing 229), it has also been said that with a good man in the saddle, the unruly horse can be kept in control, it can jump over obstacles, it can leap the fences put up by fictions and come down on the side of justice (as per Lord Denning MR in *Enderby Town Football Club Ltd v. Football Association Ltd* [1971] Ch 591). In *Koid Hong Keat v. Rhina Bhar* [1989] 2 CLJ 1219; [1989] 2 CLJ (Rep) 5, at p. 8 Wan Adnan J (as he then was) adverted to a *dictum* in *Re A Solicitor* [1945] 1 All ER 445 which states, "the law relating to public policy must change with the passage of time, it cannot remain immutable." Indeed what was once thought of

and treasured as immutable may now be treated as inimical to fair competition and hence ignominious. In the Indian Supreme Court case of *Central Inland Water Transport Corp Ltd v. Brojo Nath Ganguly* AIR 1986 SC 1571 at p. 1612, Madon J when dealing with s. 23 of the Indian Contracts Act which is in *pari materia* with our s. 24(e) of our Contracts Act 1950 said: It is ... clear that the principles governing public policy must be and are capable, on proper occasion, of expansion or modification. Practices which were considered perfectly normal at one time have today become obnoxious and oppressive to public conscience. If there is no head of public policy which covers a case, then the court must in consonance with public conscience and in keeping with public good and public interest declare such practice to be opposed to public policy. Whatever may have been the main motive behind an inflexible scale fees for many a profession, that is now an anachronism and an affront to fair competition. Whilst it was once a trademark of the professions it is now fast becoming a taboo.

[30] In *Koid Hong Keat v. Rhina Bhar* [1989] 2 CLJ 1219; [1989] 2 CLJ (Rep) 5, referring to whether an agreement by the defendant, a solicitor, to pay the plaintiff a percentage of her fees for introducing legal work by way of touting was against public policy and hence ought to be struck down, the court has this to say: "In my view, before the court can regard touting as opposed to public policy under s. 24(e) of the Contracts Act 1950 there must be shown to the court that touting has a tendency to be injurious to the public welfare. The Legal Profession (Practice and Etiquette) Rules 1978 were made by the Bar Council for regulating the professional practice, etiquette, conduct and discipline of advocates and solicitors. They do not apply to other people. The rules were not made by Parliament. They therefore cannot be taken to reflect public opinion. Has public opinion been expressed in this matter? I have not been informed of and I have not come across any expression of opinion from the public either for or against touting. The society has not shown its abhorrence to touting. If the prohibitions in rr. 51 and 52 are statutory provisions, I will have no hesitation to hold that touting is injurious to the public welfare because laws are reflections of the public opinion. (*In the matter of Phool Din & Ors* AIR 1952 Allahabad 491 (foll)."

[31] Might it not be said in this case that since there are no express prohibitions on giving a discount by a member of the profession of licensed land surveyors or the parties agreeing to lesser professional fees under the Act, can one then truly say that an agreement on discounted fees is against public policy? There is at best no evidence on that and what the Board prescribed for its members, which the public has no say

over on the matters of fees smacks more of selfishly safeguarding, sanctioning and securing their professional fees than of selfless service to the public.

[32] The Right Honorable Prime Minister, Datuk Seri Najib Tun Razak in his speech on 30 March 2010 in launching the New Economic Model had alluded to the fact that professionals have to be more competitive where fees structures are concerned if they are to be successful in vying for work in a global market.

[33] In launching the 10th Malaysian Plan on 11 June 2010, the Right Honourable Prime Minister, Datuk Seri Najib Tun Razak said:

> In addition, business regulations that are outdated will be abolished. Towards this end, the Malaysian Productivity Corporation (MPC) will be restructured to spearhead a comprehensive review of business regulations and improve processes and procedures to increase the productivity and competitiveness of major economic sectors.
>
> Healthy competition is needed to make the economy more efficient and dynamic. For this, the Competition Law will be introduced to provide a regulatory framework against market manipulation and cartel practices that may affect market efficiency.
>
> A Competition Commission and Appeal Tribunal will be established to ensure more orderly and effective implementation of the law.

See: *Working towards a holistic change* http://www.nst.com.my/nst/articles/16rmp/Article/#ixzz0tX8c6qFg (accessed on 12 July 2010)

[34] There is a palpable paradigm shift that has started and soon inflexibly-fixed scale fees system and structures will have to be set aside in favour of fair competition where the customers, consumers and clients will have a choice with fees as a factor to be taken into consideration before engaging the services of a professional. It is to be noted that many jurisdictions have done away with inflexibly-fixed scale fees for non-contentious legal work like in UK, Australia, New Zealand and Singapore where competition laws are in vogue.

[35] Further if charging a fee lower than the stipulated scale is to be prohibited, penalised and punished then the Act must criminalise the act and any action or device aimed at achieving or arriving at what is actually a discount. At the very least the Act should state in plain language that any agreement on a discounted fee is null and void and unenforceable and that the member who has indulged in such a practice shall be deemed to have misconducted himself. All that the Regulation punishes is against overcharging and not undercharging or non-charging. I know of no profession that would so criminalise any act or attempt at

a discount if indeed it is so obnoxious, abhorrent and anathema to the profession that disgust and aghast have to be sufficiently reflected as in an abomination!

Pronouncement

[36] In the light of the above reasons I find that there is no legal prohibition against agreeing to a fee lower than the scale fees. An agreement on discounted fees is not in conflict with the structure and scheme of scale fees under the Act and Regulations. The defendant's application under O. 14A Rules of the High Court is hereby dismissed with cost of RM1,000 to be paid by the defendant to the plaintiff.

Postscript

[37] The winds of change are not just blowing in the corridors of commerce and competition but also in the corridors of our courts. This is a 2002 case. Perhaps parties have slipped into slumber land while prosecuting and defending this claim. This will be a thing of the past for any party that so sleeps after filing a suit will be awakened from its stupor, as the courts under the dynamic leadership of the Right Honourable Chief Justice Zaki Azmi (following the Chief Justice's speech at the Lincoln's Inn dinner on 9 July 2010 given in his honour for being made an honorary bencher: that henceforth no titles shall be used in reference to judges in court orders and judgments) proactively and purposefully call up cases long outstanding and fix them for speedy disposal. No stones will be left unturned and no efforts spared until the backlog and clog is cleared and the cases are current. Behold the old is gone and the new has come! Never before have judges and lawyers alike worked so hard to clear the backlog of cases that have clogged up and choked the court system. With this in mind the court has fixed 24 August 2010 as the hearing date for the trial and final disposal of the case.